

nonimmigrant for the period of his or her authorized employment. 8 U.S.C. § 1182(n)(A)(i); 20 C.F.R. §§ 655.730; 655.731, 655.732. Upon certification of the LCA by the DOL, the employer is required to pay the wage rate and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2).

Under the INA's "no benching" provisions, the employer is obligated to pay the required wages even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer (e.g., because of the lack of assigned work)" 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i). However, the employer does not have to continue to pay an H-1B nonimmigrant if "there has been a *bona fide* termination of the employment relationship." The employer must notify USCIS that the employment relationship has ended so that USCIS may revoke approval of the H-1B visa. 20 C.F.R. § 655.731(c)(7)(ii); 8 U.S.C. § 214.2(h)(11)(2005). Additionally, the employer need not pay wages to an H-1B nonimmigrant who is in nonproductive status due to conditions unrelated to employment that remove the nonimmigrant from his or her duties at his or her "voluntary request and convenience" or which render him or her unable to work, such as a requested leave of absence. 20 C.F.R. § 655.731(c)(7)(ii).

Congress delegated the authority to administer and enforce the LCA provisions of the H-1B program to the Secretary of Labor. 8 U.S.C. § 1182(n)(2). Accordingly, the Secretary promulgated regulations to implement the H-1B program found at 20 C.F.R. Part 655, Subparts H and I. Pursuant to this authority, the Administrator, Wage and Hour Division ("Prosecuting Party" or "Administrator") conducted an investigation of Frank Sacks Tennis Camps, Inc. ("FSTC" or "Respondent") to determine compliance with the provisions of the H-1B program. On August 13, 2009, the Administrator issued a determination to Respondent, citing violations of the Act and regulations promulgated thereunder. Respondent filed a timely request for a hearing.

In this case, the Administrator alleges that Respondent failed to pay the prevailing wage rate of \$19.35 per hour from October 1, 2008, to February 5, 2010, to its former H-1B nonimmigrant employee, Marina Galiot ("Galiot"), in violation of 20 C.F.R. § 655.731. *See* 20 C.F.R. § 655.805(a)(2). The Administrator alleges that Ms. Galiot is owed back wages for both productive and nonproductive time. The Administrator also seeks an Order affirming its determination that Respondent failed to provide notice of filing of an LCA in violation of 20 C.F.R. § 655.734, § 655.805(a)(5), and failed to maintain required documentation as required by 20 C.F.R. § 655.731(b), § 655.738(e).

Statement of the Case

On December 4, 2009, H-1B nonimmigrant, Galiot, filed a complaint with the U.S. Department of Labor, Wage and Hour Division, alleging that her former employer, FSTC, had committed a number of violations of the H-1B provisions set forth in the Act. (RX 7).² Following investigation of the complaint, on May 18, 2010, the District Director of the Chicago Wage and Hour Division Office issued a Notice of Determination ("Determination") to FSTC

² In this decision, Joint Exhibits will be referred to as "JX," Administrator/Prosecuting Party Exhibits will be referred to as "AX," Respondent Exhibits will be referred to as "RX," and the hearing transcript will be referred to as "Tr."

finding that FSTC had violated the Act by failing to pay Galiot the prevailing wage for productive time, failing to pay Galiot for nonproductive time, failing to provide notice of filing of the LCA, and failing to maintain required documentation. (JX 10). The Determination required FSTC to pay Galiot back wages in the amount of \$12,546.02 for the pay period of October 4, 2008, to March 14, 2009. (*Id.*).

On June 1, 2010, Galiot appealed the determination to the Office of Administrative Law Judges (“OALJ”), asserting that she was due back wages through February 4, 2010, rather than March 14, 2009. On June 2, 2010, FSTC appealed the Determination, asserting that it had properly terminated its employment relationship with Galiot on December 1, 2008, by sending a letter to USCIS on December 1, 2008, notifying it of the same. (RX 6). On June 9, 2010, the case was assigned to me for adjudication. On June 21, 2010, I issued a notice scheduling the case for a formal hearing on October 7, 2010, in Chicago, Illinois.

On July 20, 2010, the Administrator filed a Motion to Amend the Determination, stating that the Wage and Hour Division had confirmed that USCIS first learned of Galiot’s change in status when she filed an application with USCIS for Adjustment of Status to Register Permanent Residence on February 4, 2010. Based on that information, the Administrator stated that it had reconsidered the nonproductive time period and sought to amend the Determination to reflect an ending period of February 4, 2010, and back wages owed to Galiot in the amount of \$45,518.41. On October 13, 2010, Respondent filed a Response in Opposition of Administrator’s Motion to Amend the Determination. On October 14, 2010, I granted the Administrator’s Motion to Amend the Determination.

On March 2, 2011, I conducted a formal hearing in this matter in Chicago, Illinois. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18. At the hearing, I admitted JX 1-18, AX 1-2, and RX 1-7. The Administrator presented testimony of Galiot and Robert Lisek, Assistant District Director in the Chicago district office for the Wage and Hour Division. Respondent presented testimony of Galiot and Franklin Sacks, President of FSTC. The record was held open for 60 days post-hearing to allow the submission of additional evidence and 90 days for the submission of written briefs. (Tr. 268). The parties did not submit post-hearing evidence. Briefs were filed by the Respondent and Administrator on May 2, 2011, and June 7, 2011, respectively.

Stipulations

At the commencement of the hearing, the parties stipulated (JX A), and I find:

1. Respondent withdraws its request for a hearing on violation numbers 2 and 3 relating to failure to provide notice of filing of a LCA and failure to maintain certain required documentation.

2. Respondent has a principal office and place of business at 7870 N. Lincoln Avenue, Skokie, Illinois.
3. Respondent operates tennis programs, including camps, clinics, group lessons, and private lessons.
4. Franklin Sacks is the owner and president of Respondent.
5. Respondent voluntarily participated in the H-1B visa program in order to employ an alien in a specialty occupation on an H-1B visa.
6. Respondent applied for certification with the Employment and Training Administration, U.S. Department of Labor, and petitioned USCIS for the temporary employment of an advertising and promotional manager at a prevailing wage rate of \$19.35 per hour.
7. Respondent filed an LCA for the temporary employment of an H-1B nonimmigrant worker for the time period October 1, 2008, to October 1, 2011.
8. Respondent agreed to pay at least the local prevailing wage or the employer's actual wage, whichever was higher, and pay for nonproductive time, as set forth in "Employer Labor Conditions Statements."
9. Respondent agreed to notify workers at the place of employment with a copy of the filed LCA, as set forth in "Employment Labor Condition Statements."
10. Respondent is not an H-1B dependent employer and is not a willful violator.
11. In relation to Respondent's application for the temporary employment of an H-1B nonimmigrant worker, Franklin Sacks, President, acted on behalf of Respondent as the designated hiring official.
12. Respondent filed a petition with USCIS requesting the issuance of a visa under the H-1B program for the H-1B nonimmigrant worker.
13. By notice dated May 16, 2008, Respondent was notified by USCIS that its H-1B petition was approved.
14. Respondent was authorized to employ an advertising and promotional manager as a nonimmigrant worker under the H-1B program from October 1, 2008, to September 30, 2011.
15. Respondent employed Galiot as an advertising and promotional manager nonimmigrant worker under the H-1B program, under the terms and conditions set forth in the LCA referred to hereinabove.
16. Galiot had been in the United States under the USCIS' Optional Practical Training Program ("OPT").

17. In November 2007, Galiot started employment with Respondent under OPT to perform promotional work and give tennis lessons for which she was paid \$12.00 an hour for office work and \$16.00 an hour to give tennis lessons.
18. From March 16, 2008, to May 24, 2008, respondent paid Galiot \$17.00 an hour for office work and \$20.00 an hour for tennis lessons.
19. From May 25, 2008, to early December 2008, Respondent paid Galiot \$14.00 an hour for office work and \$16.00 an hour for tennis lessons.
20. Starting October 2, 2008, Respondent temporarily employed Galiot as an advertising and promotional manager under the H-1B program at its place of business.
21. In addition to performing advertising and promotional work, Galiot gave tennis lessons, as needed.
22. During Galiot's H-1B employment with Respondent, she took leave on November 26-29, 2008, and on December 4, 2008.
23. Galiot's last day of productive work for Respondent was on December 5, 2008.

Disputed Facts

At the commencement of the hearing the parties presented the following as disputed facts (JX A):

1. Administrator claims that Respondent did not notify USCIS of Galiot's termination of employment and that USCIS never received a letter from Respondent notifying it that Respondent had terminated Galiot. Respondent claims it caused to be mailed to USCIS on December 1, 2008, notification of Galiot's termination of employment.
2. Administrator claims Respondent never offered Galiot transportation costs to leave the United States and return to her homeland after termination. Respondent claims it offered Galiot transportation costs to return to her homeland.
3. Respondent claims it notified Galiot in early November of 2008 that her services would be terminated at the end of November 2008.
4. Respondent claims Galiot worked additional days in December of 2008 after she was terminated, without the prior knowledge of Respondent.
5. Respondent claims Galiot was terminated due to her inability to perform her duties.
6. Respondent claims Galiot had actual knowledge that she was terminated effective December 1, 2008. Administrator claims Galiot did not have actual knowledge until March 14, 2009.

7. Administrator claims that Respondent owes Galiot \$2,019.62 in unpaid back wages [for productive time]. Respondent denies owing Galiot this amount of back wages.

8. Administrator claims that Respondent owes Galiot \$43,498.79 in unpaid wages for nonproductive benched time. Respondent denies owing Galiot any amount in wages for nonproductive benched time.

Issues

1. Whether Respondent violated the Act by failing to pay the prevailing wage for productive work for the period from October 1, 2008, through December 5, 2008, and nonproductive work for the period from December 6, 2008, through February 4, 2010.

2. Whether Respondent effectuated a *bona fide* termination of its employment relationship with Galiot under the H-1B program to end its obligations to pay Galiot.

3. If Respondent violated the Act, the appropriate remedy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of Evidence

Testimony

Testimony of Marina Galiot, Tr. 12-122, 261-266

Galiot testified in relevant part as follows on direct examination. She came to the United States in December of 2000 to attend a university in Tennessee. (Tr. 13). She was offered a full tennis scholarship. (Tr. 13). After five semesters she transferred to Seton Hill University in Pennsylvania where she studied graphic design and received a Bachelor in Fine Arts degree in 2005. (Tr. 13-14). She then was offered a job and stayed in the United States under the Optional Practical Training (“OPT”) Program. (Tr. 14). In 2007, she received a Master’s Degree in Business Administration from Seton Hill. (Tr. 15).

In November of 2007, she became employed by Respondent, FSTS in Skokie, Illinois, in the job of tennis instructor. (Tr. 16). She also did office work such as marketing, answering the phone, signing people up for classes, and explaining services offered. (Tr. 17). Initially, she was paid an hourly rate of \$12.00 for office work and \$16.00 for tennis court work. (Tr. 17). She was paid at this rate until March of 2008. (Tr. 17). In March of 2008, she was offered a job as a communications specialist at another company. (Tr. 17). She informed Frank Sacks (“Sacks”) who told her that he really wanted her to stay and offered her a higher salary of \$17.00 for office work and \$20.00 for tennis court work. (Tr. 18-19). She stayed on at FSTS and her salary was raised as offered. (Tr. 19).

FSTS also filed an H-1B petition on her behalf around the same time that he increased her salary so that she could continue to stay and work in the United States. (Tr. 20). She had to

pay \$1,570.00 for the petition filing fee. (Tr. 20). After her H-1B petition was approved in May of 2008, FSTS reduced her salary to \$14.00 for office work and \$16.00 for tennis court work. (Tr. 21). During the summer of 2008, one of the other employees, Jason Thomas, requested the whole summer off, so she assumed additional duties to include marketing, sales, scheduling, and additional teaching. (Tr. 21-22). Her duties thus increased as her salary was reduced. (Tr. 22). She was paid at the reduced hourly rate of \$14.00 for office work and \$16.00 for tennis court work until December 5, 2008. (Tr. 23).

She requested some days off for Thanksgiving of 2008. (Tr. 24). She worked on Sunday, November 30, 2008, from 10:00 a.m. to 6:00 p.m. She saw Frank Sacks on that day while she was teaching a tennis lesson. (Tr. 24). She asked him if she could have December 4, 2008, off because it was her birthday. (Tr. 25). He wished her a happy birthday and gave her the day off. He did not say anything else, and she told him she would be in the office the next day (Dec. 1, 2008). (Tr. 25). On December 5, 2008, she worked from 9:30 to 5:30. (Tr. 26). She saw Sacks on that day at around 5:30, and he told her he had no more work. (Tr. 26). She thought he meant it was the low season. (Tr. 27). She asked him what would happen with her H-1B status, but he did not respond and only said he had to go pick up his son. (Tr. 27). Sometime in February 2009, Sacks called her and left a voice mail saying that he would probably revoke her visa. (Tr. 28). She returned his call two times, but could not reach him. In mid-March she reached him on his cell phone. (Tr. 28). She inquired as to her H1-B status, but could not get any details from him. Finally he said that he had revoked her visa, but he was not sure when and would not give her specific details. (Tr. 29). She told him that she needed transportation home, and he said "Good luck with that" and hung up on her. (Tr. 29). She was never offered transportation home. (Tr. 30). She heard nothing further from Sacks after that March 2009 phone conversation, and received no documents regarding termination of her employment. (Tr. 30). She did not receive any letters from USCIS after her conversation with Sacks. (Tr. 31).

On April 22, 2009, she married. (Tr. 32). She gave birth to a child on August 18, 2009. (Tr. 32). If she had been working, she would have taken one week off before the birth and three weeks off after the birth. (Tr. 32). On February 5, 2010, USCIS notified her and her husband that it had received her husband's Petition for Alien Relative to adjust her immigration status to that of a permanent resident. (Tr. 33-34). From mid-March of 2009 when she understood that Sacks had terminated her employment until February 5, 2010, when she received the notice from USCIS, she was ready, willing, and able to work at FSTC. (Tr. 34-35).

Galiot testified as follows on cross examination. Between December 5, 2008, and March of 2009, she thought that she was benched or laid off for lack of work. (Tr. 35-36). She did not call Sacks because she thought he would call her. (Tr. 36). She did not seek other employment. (Tr. 36). The high season runs from April until October. (Tr. 36). The high season is the time when there is more tennis work such as classes and tennis clinics. (Tr. 37). During the high season they would have had thousands of students and there would have been more work for her to do in the office to schedule the classes and coaches to teach those classes as opposed to low season when they would have only had classes a couple times a week. (Tr. 38).

It was not part of her responsibility to seek out classes and park districts for work during the summer. (Tr. 38). She did marketing from the office because Sacks already had contracts with park districts, so it wasn't necessary for her to go and advertise on her own because the park districts had their own brochures. She only had to send them class schedules that would be advertised in their own brochures. She would not have to go out there to do the sales. (Tr. 38). It was not part of her job to go to the park districts and try to get more business. (Tr. 39). Marketing could be done a couple months prior to the season and it would not necessarily need to be done five months prior to the season. (Tr. 40). They would start the marketing in February for the season which would start in April. (Tr. 40). She did not feel it necessary to call Sacks between December 2008 and February 2009 because she was expecting him to call her and tell her to return to the office. (Tr. 40). Sacks approached her and asked about her status and how it works with foreign students and workers. (Tr. 41). She informed him that the next step after OPT was H-1B status. (Tr. 41).

The busiest months are during the summer when school is off. (Tr. 42). It is slower in November and December, but there are still some classes. (Tr. 42). Sacks did not tell her he had no more work until December 5, 2008. (Tr. 47). In late February of 2009, Sacks left her a voice mail saying that he would probably revoke her visa. (Tr. 48). After March 2009, she called USCIS to try and find out her status, but she could not get any information because she was not an employer. (Tr. 49). After Sacks left her the February 2009 voice mail, she returned his call. When she could not reach him, she left a voice mail stating that she needed to know the dates in case he did revoke her visa, and she requested a copy of the letter sent to Immigration Services. (Tr. 50). Her intent in March of 2009 was to return to Serbia. (Tr. 53). When she called USCIS, they would not tell her anything because she was not an employer and told her that her employer was required to give her the information. (Tr. 55). She did not know whether she could check her immigration status online. (Tr. 58). Sacks never offered her transportation home. (Tr. 63).

Galiot responded to direct questions from Respondent's counsel as follows. The new job title of advertising and promotional manager came with new duties. (Tr. 64). When Jason left, she also assumed his duties such as printing jobs, calling and scheduling people, and teaching. (Tr. 65). Her new responsibilities under the position of advertising and promotional manager included marketing, advertising and graphic design. (Tr. 65). Sacks did not have the graphic design software she needed. (Tr. 66). In March of 2008, she received a pay raise because Sacks wanted her to stay on and turn down a job offer from a different company. (Tr. 67). Her position as an advertising and promotional manager was to start on October 1, 2008, according to the H-1B petition. (Tr. 68-69). She was never paid the rate of \$19.35 an hour which is what she was supposed to be paid starting on October 1, 2008. (Tr. 69). Sacks lowered her salary as soon as the H-1B petition was approved in May of 2008. (Tr. 70). Sacks did not tell her in May of 2008 that he was not satisfied with her job performance. His only complaint was that she did not have a car. (Tr. 72). Under the H-1B position, she was not to teach tennis lessons, but her position was to serve as a promotion and advertising manager. However, in October and November of 2008, Sacks still required her to teach tennis. (Tr. 74-75). Sacks wanted her to teach tennis lessons rather than other instructors whom she had scheduled. (Tr. 78). Other instructors were paid more money to teach tennis lessons. (Tr. 78-80). In May of 2008, Sacks lowered her salary. (Tr. 83).

In October, 2008, her new position as advertising and promotion manager started under H-1B and her pay was supposed to increase to \$19.35 an hour. (Tr. 85). She did not receive the pay raise. When she inquired about it, Sacks told her that he never intended to pay her that much and if she did not like it he would call Immigration and send her home. (Tr. 85). She never had a conversation with Sacks in November of 2008 regarding her termination. (Tr. 87). The first time Sacks talked to her about not working was on December 5, 2008. He never offered her transportation home. (Tr. 88). Sacks was injured in November of 2007, but by November of 2008, he was back to full strength and present in the office and on the tennis court. (Tr. 89). On December 5, 2008, Sacks told her he did not have any more work for her which she attributed to it being the low season. (Tr. 90). She assumed he would call her back in the future. (Tr. 91-92). After her phone conversation with Sacks in March of 2009, she assumed she was no longer employed at FSTC. (Tr. 93). She would have returned to work at FSTC if Sacks had called her back. (Tr. 93-94). In June of 2009 she applied for unemployment benefits with the Illinois Department of Employment Security ("IDES"). (Tr. 95-96). She was granted benefits, but decided not to use them. (Tr. 96). She never saw a copy of the letter that Sacks sent to IDES (RX 2). (Tr. 105).

Galiot responded to the following direct questions from the Administrator's counsel. She expected her hourly wage to increase to \$19.35 on October 1, 2008, because that was the wage stated on the H-1B documentation. (Tr. 107-108). She did not have a car when she was hired by FSTC in November of 2007 or in March of 2008 when she was given a raise. (Tr. 108). In March of 2008, Sacks really liked the way she did her job and wanted her to stay, so he raised her salary. (Tr. 109).

Galiot testified as follows on re-cross examination. She did not know if her new position of advertising and promotional manager under the H1-B documentation precluded her from performing other duties such as teaching tennis lessons. (Tr. 110-113).

Galiot was recalled as a witness by the Respondent's counsel and testified as follows. She does not know if Sacks sent a letter to USCIS on December 1, 2008. (Tr. 261). She found out in February or March of 2010 that her H-1B visa was still active. (Tr. 262).

Testimony of Robert Lisec, Tr. 122-198

Lisec testified as follows on direct examination. He is employed by the U.S. Department of Labor Wage and Hour Division as an assistant district director in the Chicago district office. (Tr. 122-123). He has served in that capacity for eight years. (Tr. 123). Prior to that, he served as a wage and hour investigator for about 16 years. (Tr. 123.).

He supervised the investigation of FSTC. (Tr. 124). They received a complaint from Galiot in December of 2009. (Tr. 125). When a petitioner files an LCA, it attests that it will pay the non-immigrants at least the local prevailing wage or actual wage, whichever is higher, and pay for non-productive time. (Tr. 127). The least amount of prevailing wage per hour that an advertising and promotional manager could be petitioned for in the Chicago area was \$19.35 an hour. (Tr. 129-130). The H-1B petition filed by FSTC was approved by USCIS on May 16, 2008, and was to be valid from October 1, 2008, until September 20, 2011. (Tr. 130-131). His

office determined that FSTC did not pay the prevailing wage of \$19.35 an hour from October of 2008 until Galiot left the position, but rather paid \$14.00 and \$16.00 per hour. (Tr. 132-133). His office also determined that Galiot was not paid for non-productive time. (Tr. 133). There was no documentation verifying that Galiot had been offered transportation home. (Tr. 134). His office inquired of USCIS as to whether it had any information in its files regarding whether FSTC had notified USCIS that it was terminating Galiot. (Tr. 135). The last action reflected by USCIS records was that it had mailed a notice approving the H-1B petition on May 16, 2008. (Tr. 136). His office contacted the Fraud Detection Unit for USCIS via e-mail and requested that it check its files for any evidence or letters in the file of the employer requesting to terminate the visa of the H-1B worker. (Tr. 136-138). The Fraud Detection Unit responded that its records showed no correspondence was received from FSTC after the original petition on April 18, 2008. (Tr. 138).

His office calculated the back wages due to Galiot for productive and non-productive time. (Tr. 140-141). For non-productive time, it based its calculation on a start date of December 6, 2008, which was the last day Galiot was paid to work. (Tr. 141-142). It chose February 4, 2010, as the end date because that was the date USCIS first received notice of a request for a change to Galiot's immigration status. (Tr. 142). In calculating back pay, it subtracted out for holidays and a period for the birth of Galiot's child. (Tr. 143). Back wages for non-productive time were calculated based upon a salary of \$19.35 an hour and a 40-hour work week. (Tr. 143). An employer must pay the prevailing wage rate as reflected on the LCA. (Tr. 144). If an employee is not doing a good job, an employer may terminate the individual and send notice to USCIS, but it must still pay the employee while the employee is working there. (Tr. 145).

Lisec testified as follows on cross examination. He does not know for certain that Sacks did not send a letter to USCIS on December 1, 2008. (Tr. 146). Sending a letter to USCIS is one of the steps in a proper termination along with offering airfare home. (Tr. 146). There was no documentation corroborating that FSTC had offered the employee transportation home. (Tr. 150). He does not know what steps USCIS took to check its records. (Tr. 161).

Lisec testified as follows on redirect examination. In the case of an H-1B termination, it is the employer's burden to show that it notified USCIS that a termination was effective. (Tr. 178). The letter which Sacks stated he had sent on December 1, 2008, raised an issue of credibility and validity because the letter stated that Galiot had been terminated, but her time sheets indicated that she, in fact, continued to work after December 1, 2008. (Tr. 179).

Lisec testified as follows on re-cross examination. He did not ask Sacks why Galiot continued to work after December 1, 2008. (Tr. 181).

Testimony of Franklin Sacks, Tr. 198-260

Sacks testified as follows on direct examination. He is the president of FSTC and has operated the business for 31 years. (Tr. 199). FSTC teaches tennis and deals with different municipalities, park districts, villages, cities, communities, and service agencies. (Tr. 199). He thinks FSTC has two employees besides the tennis coaches. (Tr. 199). FSTC employs from 10

to 25 coaches. Galiot was hired in November of 2007 to teach tennis and work in the office. (Tr. 200). Her initial pay rate was \$12.00 per hour for tennis lessons and \$16.00 per hour for office work. (Tr. 200). He initially thought she did a fairly good job. (Tr. 201). He suffered a spinal cord injury approximately two days after Galiot was hired and was paralyzed for a time. (Tr. 202). From November of 2007 until June of 2008, he did not supervise Galiot on a day to day basis. He had major surgery in May of 2008. (Tr. 202).

Under the H-1B petition, Galiot's position was to be a marketing and promotions director, and she was to go out and get more business for FSTC and develop promotional materials. (Tr. 203). He knew she did not have a car when she was hired. (Tr. 203). She said she would get a car if hired for the marketing and promotions director position. (Tr. 204). The marketing and promotions director was a new position at FSTC. (Tr. 204). In March of 2008, he sent in the application for the H-1B position and raised her salary to \$17.00 per hour for office work and \$20.00 for tennis lessons. (Tr. 204-205). He increased her salary because of new responsibilities and to help get her H-1B status approved. (Tr. 206). In March of 2008, Galiot began performing new duties, but she did not do the things he asked which were to develop promotional materials and call outside customers for business. (Tr. 206). He also found her graphic design skills to be unsatisfactory. (Tr. 207). In April or May of 2008, he received notification that Galiot's H-1B petition had been approved, so her status was to become active on October 1, 2008. (Tr. 208). In May of 2008, he lowered Galiot's salary to \$16.00 per hour for tennis lessons and \$14.00 per hour for office work because she was not performing her duties. (Tr. 209). He told Galiot he was lowering her salary because she was not performing her duties. (Tr. 209).

On October 1, 2008, Galiot began working under the H-1B position. He continued to pay her \$14.00 for office work and \$16.00 for tennis lessons. (Tr. 210). Her performance did not improve after October 1, 2008. (Tr. 210). At the end of October or early November he told Galiot that her performance was not satisfactory and she would be terminated immediately. (Tr. 210). He agreed to let her stay until the end of November 2008. (Tr. 211). During the conversation, he also offered her transportation back which she declined. (Tr. 212). She was the only H-1B employee he had ever had. (Tr. 212). Around the time that he told her he was terminating her, he contacted the Department of Immigration and asked what his requirements were. (Tr. 213). He called an 800 number and was told he had to offer the worker transportation and send a letter to the immigration service saying the person was terminated. (Tr. 214). He did not work in the office every day with Galiot. (Tr. 216). He had no way of knowing whether Galiot was working any particular day. (Tr. 216).

On December 1, 2008, he created a letter (JX 18) and sent it to USCIS notifying it that Galiot was no longer employed by FSTC and that she had been offered transportation home and declined it. (Tr. 217-218). He personally wrote the letter and placed it in a post box near his home. (Tr. 219). After mailing the letter, he believed his obligations to Galiot were complete. (Tr. 221). He never heard anything from USCIS after mailing the letter. (Tr. 221). He was unaware that Galiot worked on December 3, 2008. (Tr. 222). On December 5, 2011, he went to the office and discovered that Galiot was working. (Tr. 222). He told her that she was terminated. (Tr. 223). When he talked to her late in October or early November of 2008, he did not tell her that she was being terminated for lack of work, but rather that he was not getting fair

value for her work. (Tr. 223). December 5, 2008, was the last time he saw Galiot. (Tr. 224). He never told her that she might be called back to work. (Tr. 224). In February 2009, Galiot telephoned him and said she wanted transportation back to Serbia. He told her that his obligations to her were complete. (Tr. 225).

Around June of 2009 he was aware that Galiot had filed an unemployment claim with the IDES. (Tr. 226). He wrote a letter to the IDES (RX 2) stating that Galiot had been terminated because she was not able to meet the requirements of her position and that he had offered her an airline ticket to her home country, but she chose to stay in the United States without legal authorization to find other employment. (Tr. 228). He wrote the letter to IDES on July 13, 2009, six or seven months prior to learning that Galiot had filed a claim in this matter. (Tr. 230). In February 2010, he learned that Galiot had filed a claim with the Department of Labor. (Tr. 232).

Sacks testified on cross examination as follows. He hired Galiot in November of 2007, knowing she did not have a car. He knew she did not have a car when he raised her salary in March of 2008. (Tr. 234). He raised her salary in March 2008 because she was doing a good job, would perform other duties, and he wanted to help her get her H-1B status approved. (Tr. 236). He filed a petition to have Galiot employed as an advertising promotional manager and represented that he would pay her the prevailing wage rate of \$19.35. (Tr. 240). He did not indicate on the petition that Galiot would be performing as a tennis instructor or in any other capacity than advertising and promotional manager. (Tr. 241). He was notified that the petition had been approved in mid-May 2008. In late May 2008, he informed Galiot that her wages would be reduced. (Tr. 243). In March 2008, he informed Galiot that she was doing a good job, he wanted her to stay, and gave her a pay raise. In April 2008, he filed an H-1B petition on Galiot's behalf. In May 2008, after he was notified that the petition had been approved, he cut her pay. (Tr. 244-245). He never paid Galiot \$19.35 an hour. (Tr. 245).

He returned to the office full-time in the summer of 2008. (Tr. 245). He also had a bookkeeper and another person working in the office. (Tr. 246). In late June of 2008, he would go into the office three or four days a week. (Tr. 247). While he was on medical leave he had an office manager, Jason Thomas, a bookkeeper, and Galiot. (Tr. 247). Jason was paid \$24.00 per hour to give tennis lessons. (Tr. 249). The first week of November 2008, he told Galiot she was fired. (Tr. 250). Galiot begged to stay and he said she could work until the end of November 2008. (Tr. 250). Following the conversation during the first week of November, he did not speak to Galiot about her employment again until he found her in the office on December 5, 2008. (Tr. 251). He does not recall Galiot asking for her birthday off. He did not know that she was working on November 30, 2008, or December 3, 2008. (Tr. 252). When he saw her on December 5, 2008, he told Galiot that she was terminated and couldn't come back. (Tr. 253). He did not do any research on the cost of a ticket to Serbia. (Tr. 253). He did not call Galiot in February 2009 and leave a voicemail. (Tr. 253). He never spoke to Galiot in March of 2009. (Tr. 254). He spoke to someone at USCIS about Galiot's employment in early November 2008, but does not know who he spoke with or that person's title. (Tr. 254-255). He typed the letter to USCIS himself and did not send it by means that could be tracked. (Tr. 256). He did not receive any communication from USCIS after sending the letter. (Tr. 256). He did not contact USCIS after sending the letter. (Tr. 256). He intended to send a copy to Galiot, but he never did so. (Tr. 257).

Sacks testified as follows on redirect examination. He had no reason to think there was a problem when he did not get a response from USCIS. (Tr. 258).

Documentary Evidence

JX 1, Labor Condition Application for H-1B and H-1B1 Nonimmigrants

This document reflects that FSTC petitioned for a nonimmigrant to work as an advertising and promotional manager for the period October 1, 2008, to October 1, 2011, at the pay rate of \$19.35 an hour in Skokie, Illinois.

JX 2, Form I-797C

This document was sent by USCIS to petitioner, FSTC, on April 18, 2008, notifying it that a petition for a nonimmigrant worker had been received on April 14, 2008.

JX 3, Form I-797A

This document was sent by USCIS to petitioner, FSTC, on May 16, 2008, notifying it that the petition of nonimmigrant worker was approved for the period from October 1, 2008, to September 30, 2011.

JX 4, Form I-797C

This document was sent by USCIS to Stephen P. Portock on February 11, 2010, notifying him that an I-130 Petition for Alien Relative had been received on February 5, 2010.

JX 5, Form I-797

This document was sent by USCIS to Stephen P. Portock on May 27, 2010, notifying him that an immigrant petition for relative had been approved.

JX 6, Form I-797C

This document was sent by USCIS to Marina Galiot on February 11, 2010, notifying her that an application to register permanent residence or adjust status had been received on February 5, 2010.

JX 7, Form I-797C

This document was sent by USCIS to Marina Galiot on February 11, 2010, notifying her that an application for employment authorization document had been received on February 5, 2010.

JX 8, Invoice/Time Sheets

These time sheets reflect the hours worked by Galiot at FSTC for the period of September 30, 2008, to December 5, 2008.

JX 9, Payroll documents

These documents reflect payments made to Galiot for her work at FSTC.

JX 10, Administrator's Determination

This document is a letter dated May 18, 2010, from the U.S. Department of Labor Wage and Hour Division to Frank Sacks informing him of the Administrator's Determination. It states in part that his firm committed the following violations: failed to pay wages as required, failed to provide notice of filing of the LCA as required, and failed to maintain documentation as required. It states that FSTC owes back wages in the amount of \$12,546.02.

JX 11, Order Granting Administrator's Motion to Amend Determination

This document is an order signed by the undersigned judge, on October 14, 2010, granting the Administrator's motion to amend its May 18, 2010, Determination to reflect that the benching period lasted until February 4, 2010, rather than March 14, 2009, and that Respondent owes \$45,518.41 in back wages to Galiot rather than \$12,546.02.

JX 12, Summary of Unpaid Wages

This document reflects that Martina Kelley, Investigator for the U.S. Department of Labor Wage and Hour Division summarized the unpaid wages owed to Marina Galiot for the period of October 2, 2008, to February 4, 2010, as amounting to \$45,518.41.

JX 13, Computation Worksheet

This document reflects the method used by the Department of Labor Wage and Hour Division to compute back wages owed by FSTC.

JX 14, USCIS Webpage

This document shows the case status for petition for nonimmigrant worker (receipt number: 0814251948) and reflects that on May 16, 2008, notice was given of the approval of the petition for nonimmigrant worker.

JX 15, Foreign Labor Certification Data Center Online Wage Library

This document reflects that the minimum wage level for an advertising and promotions manager in the Chicago-Naperville-Joliet, IL Metropolitan Division is \$19.35 an hour.

JX 16, Administrator's Responses to Interrogatories

This document contains the Administrator's responses to Respondent's first set of interrogatories.

JX 17, Administrator's Responses to Interrogatories

This document contains the Administrator's responses to Respondent's second set of interrogatories.

JX 18, Letter from Respondent to USCIS

This letter is dated December 1, 2008, and reflects that Franklin Sacks, President of FSTC, notified USCIS that as of December 1, 2008, Marina Galiot is no longer employed by FSTC. The letter states that Galiot was offered transportation back to her home country, but declined. The letter reflects that a copy was sent to Marina Galiot.

AX 1, Investigator's Emails

This exhibit contains e-mail traffic between the Department of Labor Wage and Hour Division Investigator and the USCIS Fraud Detection Unit requesting assistance in verifying whether USCIS received a letter from FSTC informing it that FSTC took steps to terminate its H-1B visa holder. The USCIS Fraud Detection Unit in an e-mail dated March 8, 2010, states that its record system shows no correspondence from petitioner after April 18, 2008, which is the date USCIS received the petition.

AX 2, Declaration

This declaration dated February 22, 2011, is from Joseph Fierro, Assistant Center Director at the California Service Center of USCIS. It states that in the course of his official duties on February 22, 2011, he searched the USCIS administrative file and computer databases related to Receipt Number WAC-08-142-51948 (Form I-129, H-1B Petition for Nonimmigrant Worker). The Petitioner was FSTC and the beneficiary was Marina Galiot. The purpose of his search was to determine whether USCIS had taken any further action or received any correspondence subsequent to the petition approval. His search revealed that the last action taken concerning the Form I-129 was the actual adjudication of the petition and the petition was approved on May 13, 2008. The last database entry is "Approval Notice Sent." The entry is dated May 16, 2008. The administrative file does not contain any letter or other evidence of communication from the petitioner subsequent to the May 13, 2008, adjudication. There is nothing in the file indicating that Beneficiary's employment with Petitioner had been terminated. USCIS has a standard procedure for revoking the petition and H-1B visa. When a petitioner under the H-1B program notifies USCIS that it has terminated the employment of the beneficiary, USCIS takes the notification and processes a revocation for the Form I-129, H-1B Petition for Nonimmigrant Worker. USCIS sends a letter to the petitioner notifying it that a termination letter has been received and that the petition has been revoked. His search did not

reveal any indication that a termination letter had been processed or that a revocation had been issued for the Form I-129.

RX 1, Illinois Department of Employment Security Notice

This document dated July 2, 2009, was sent by the IDES to FSTC and informs FSTC that Marina Galiot filed a claim for unemployment insurance benefits on June 28, 2009, asserting separation by FSTC for lack of work. The notice further informs FSTC that it is the chargeable last employer for the claim and unless FSTC submits a protest, the chargeability decision will become final. The form is signed at the bottom by Franklin A. Sacks and makes reference to a protest letter. The second page of the document informs the employer that benefits paid will become Benefit Charges to the account of the chargeable employer.

RX 2, Letter from FSTC to IDES

This letter dated July 13, 2009, indicates that it was sent by Franklin A. Sacks to the IDES in response to the Notice of Claim to Chargeable Employer. The letter states that Galiot's position required her to have transportation to travel to meet with existing clients and prospective clients at locations outside of the FSTC office. It states that Galiot was terminated because she was not able to work and meet the requirements of the position. It further states that Galiot was offered an airplane ticket back to her home county [sic] but chose to remain in the United States without legal authorization in attempt to find other employment. It states that FSTC notified the USCIS office in Chicago that claimant's employment at FSTC had been terminated and that FSTC has met its responsibilities as an employer of the claimant as an H-1B worker and her application should be denied.

RX 3, Notice of Local Office Interview

This document is a notice dated July 16, 2009, sent by IDES to Marina Galiot informing her that a question has been raised regarding her eligibility for unemployment insurance benefits and that it will be necessary for her to be interviewed to supply information regarding her discharge for misconduct connected with work. It indicates an interview date of July 28, 2009.

RX 4, Notice to Claimant

This document is a notice dated August 19, 2009, sent by IDES to Marina Galiot informing her that it has been determined that she was discharged from FSTC because she was not able to work and meet the requirements of the position. The notice states that it has been determined that Galiot did not engage in misconduct and is therefore eligible for benefits.

RX 5, Notice to FSTC

This document is a notice dated September 18, 2009, sent by IDES to FSTC informing it that it has been determined that Marina Galiot was discharged from FSTC because she was not able to work and meet the requirements of the position. The notice states that it has been

determined that Galiot did not engage in misconduct and is therefore eligible for benefits. It informs FSTC that it may appeal this determination.

RX 6, Request for Hearing

This document dated June 2, 2010, is a letter from Respondent's attorney to the U.S. Department of Labor Chief Administrative Law Judge requesting a hearing.

RX 7, Form WH-4

This document is a U.S. Department of Labor, Wage and Hour Division, Nonimmigrant Worker Information Form. It contains information submitted by Marina Galiot and consists of her detailed allegations against FSTC.

DISCUSSION

I. Did Respondent violate the Act by failing to pay the prevailing wage for productive work time for the period from October 1, 2008, through December 5, 2008?

As an employer of an H-1B nonimmigrant, Respondent was required to pay Galiot at or above the wage rate specified in the LCA, including for time in nonproductive status due to a decision by the employer. See 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731. The Secretary has promulgated regulations providing guidance regarding the determination, payment and documentation of the required wages. See 20 C.F.R. § 655.731.³

The parties have stipulated that Respondent filed an LCA with ETA for the temporary employment of an H-1B nonimmigrant worker for the time period from October 1, 2008, to October 1, 2011. They stipulated that Respondent agreed to pay the H-1B nonimmigrant at least the local prevailing wage or the employer's wage, whichever was higher, and pay for nonproductive time, as set forth in "Employer Labor Condition Statements." The LCA (JX 1) and testimony (Tr. 8, 129-130, 240) establishes that the prevailing wage was \$19.35 per hour. The parties stipulated that Respondent employed Galiot as an advertising and promotional manager nonimmigrant worker under the H-1B program, under the terms and conditions set forth in the LCA. The parties stipulated that starting October 1, 2008, Respondent temporarily employed Galiot as an advertising and promotional manager under the H-1B program at its place

³ § 655.731(a) *Establishing the wage requirement*. The first LCA requirement shall be satisfied when the employer signs [specified forms] attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B immigrants; that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage.... The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question....

(2) The prevailing wage rate for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application....

of business. Respondent further testified that on October 1, 2008, Galiot began working under the H-1B position. (Tr. 210). The parties stipulated that Galiot's last day of productive work for Respondent was December 5, 2008.

The parties stipulated that from May 25, 2008, to early December 2008, Respondent paid Galiot at the rate of \$14.00 an hour for office work and \$16.00 an hour for lessons. The Respondent admitted in testimony that he never paid Galiot the prevailing wage of \$19.35 an hour as set forth in the LCA. (Tr. 245). In his brief, Respondent provides no authority excusing his failure to pay the prevailing wage rate set forth in the LCA. He merely states that he did not increase Galiot's salary because she was not performing the duties required of her. (R. Br. at 4).

Accordingly, I find that Respondent violated the Act by failing to pay Galiot the prevailing wage for productive work time for the period from October 1, 2008, through December 5, 2008. Specifically, I find that Respondent should have paid Galiot at the wage rate of \$19.35 per hour during this work period.

II. Did Respondent effectuate a bona fide termination of its employment relationship with Galiot under the H-1B program to end its obligation to pay Galiot?

Employers are required to pay H-1B nonimmigrant workers beginning on the date when the nonimmigrant "enters into employment" with the employer or 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition. 20 C.F.R. § 655.731(c)(6). If the H-1B worker is in a nonproductive status due to a decision by the employer (e.g., because of a lack of assigned work),⁴ the employer is still required to pay the salaried employee the full amount of the weekly salary at the required wage for the occupation listed on the LCA. See 20 C.F.R. § 655.731(c)(7)(i). However, the regulations provide that if the H-1B nonimmigrant worker experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his duties at his voluntary request and convenience (e.g., touring the U.S., caring of an ill relative), then the employer is not required to pay the required wage during that period. 20 C.F.R. § 655.731(c)(7)(ii). Payment is also not required "if there has been a *bona fide* termination of the employment relationship." *Id.* The regulations further require that the employer notify DHS (i.e., USCIS) that the employment relationship has been terminated so that the petition is canceled. 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E).

A *bona fide* termination of employment that absolves the employer from its obligation to pay the H-1B nonimmigrant salary and benefits requires the employer to prove that it has taken three steps: (1) give the employee notice that the employment relationship has terminated (2) notified USCIS that the employment relationship has terminated, and (3) when appropriate, provided the employee with payment for transportation home. *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-39, slip op. at 5 & n.3 (ARB Mar. 30, 2007) (Order of Remand); see also *Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-13, slip op. at 7-8 (ARB Sept. 29, 2006); *Amtel Group v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-6, slip op. at 5 (ARB Sept. 29, 2006). These elements arise from the INA and its regulations. Prompt notice of the employment's end allows

⁴ This is also sometimes referred to as "benching."

USCIS to cancel the employer's petition to admit the alien. 20 C.F.R. § 655.731(c)(7)(ii) and 65 Fed. Reg. 80,171 (Dec. 20, 2000) (describing bona fide termination); *see also* 8 C.F.R. § 214.2(h)(11) ("If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition [at USCIS]"). An employer becomes liable for the reasonable costs of the H-1B nonimmigrant's return transportation if it dismisses the nonimmigrant before the period of authorized admission expires. 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii). The burden of proof is on the employer to establish that it has effected a *bona fide* termination by a preponderance of the evidence. *See Gupta, supra* at n. 3; *Administrator, Wage & Hour Div., U.S. Dept. of Labor v. Ken Technologies, Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-15 (ARB Sept. 30, 2004).

Administrator contends that FSTC did not effectuate a *bona fide* termination because it failed to notify USCIS of its termination of the employment relationship with Galiot and failed to offer Galiot transportation to her home country. (A. Br. at 8-9, 12-15).

Respondent makes two alternate arguments in its brief as to why it believes it effected a *bona fide* termination. First, Respondent contends that a *bona fide* termination took place regardless of whether USCIS was notified and whether Galiot was offered transportation home. More specifically, Respondent argues that: a) a *bona fide* termination does not turn solely on whether the petitioner notified USCIS of termination; b) that notification of termination to USCIS constitutes additional, not conclusive evidence of termination; c) that an employer such as FSTC need only prove that Galiot had actual knowledge that she had been terminated; and d) that a *bona fide* termination could thus take place without notice to USCIS. (*See* R. Br at 8-12, *citing Administrator, Wage & Hour Div., U.S. Dept. of Labor v. Ken Technologies, Inc., supra* and *citing* the Administrator's Brief in Response to Petition for Review in *Ken Technologies*).

The Board considered similar arguments in cases post-dating *Ken Technologies*. In *Amtel Group of Florida Inc. v. Yongmahapakorn*, ARB No. 04-087, at 11, ALJ No. 2004-LCA-6 (ARB Sept. 29, 2006), the Board rejected the Administrator's assertion that a *bona fide* termination under the INA occurs simply when an employee receives notice of his or her termination. The Board stated:

While notice to the employee is a necessary concomitant to termination of the employment relationship, that alone is not sufficient to end the employer's obligation to pay the required wages to an H-1B employee. The employer does not effect a "*bona fide* termination" and, therefore, end its obligation to pay the required wages to the H-1B employee unless the employer has also notified the INS, so that the INS can cancel the H-1B employee's visa.

See also Gupta, supra at 5 (three steps required for *bona fide* termination); *Mao v. Nasser and Nasser Engineering and Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 9 (ARB Nov. 26, 2008) (employer's failure to report termination of employee to DHS is the critical element of proof that there was no *bona fide* termination); *In the Matter of Avenue Dental*

Care, ARB No. 07-101, ALJ No. 2006-LCA-29, slip op. at 7 (ARB Jan. 7, 2010) (notification to USCIS is a prerequisite for bona fide termination).

Accordingly, I am not convinced by Respondent's first argument and I find that in addition to notifying Galiot of her termination, Respondent was also required to notify USCIS of the termination and offer Galiot transportation home.

In Respondent's alternate argument, it argues that it effectuated a *bona fide* termination because it did, in fact, notify USCIS of the termination of the employment relationship by sending a letter to USCIS on December 1, 2008, and that it did offer Galiot transportation costs to her homeland, which she declined. (R. Br. at 12-17).

I will therefore examine in detail whether Respondent accomplished each of the three necessary steps for a *bona fide* termination as set forth above.

A. Did Respondent notify Galiot of the termination of the employment relationship?

Although Respondent and the employee, Galiot, both agree that Respondent provided her with notice of the termination of the employment relationship, there is a dispute as to when that notification was provided.

Respondent, as supported by the testimony of its President, Franklin Sacks, asserts that in late October or early November of 2008, in a face to face conversation, Sacks told Galiot that her employment was terminated, but agreed that she could continue working through the month of November 2008. Galiot asserts that this alleged conversation never took place, but rather that on December 5, 2008, while she was at work, Sacks came into the office and told her that he had no more work for her. She asserts that she interpreted this to mean that she was being benched because it was the low season for tennis, but that she would be called back to work when business picked up during the high season. Galiot asserts that she heard nothing further from Sacks until he left her a voice mail in February 2009, stating that he would probably revoke her visa. When she was finally able to speak with him telephonically in mid-March 2009, Sacks informed her that their employment relationship was terminated. At that point, she admits that she knew that her employment was terminated.

The burden of proof is on the Respondent to establish each element of the *bona fide* termination by a preponderance of the evidence. In this case, the only evidence presented on this element is the testimony of two persons with different versions of events. Respondent has not produced any additional probative indicia of termination such as a written, signed termination letter, daily log of business actions, witness to the conversation, etc. which would corroborate his version of events and assist him in establishing this element by a preponderance of the evidence.

Additionally, I find Sacks' version of events to be problematic. First, I note that Respondent admits that Galiot continued to work after the end of November employment deadline which he claims to have given her in their late October/early November conversation. Respondent does not convincingly explain why Galiot would have come in to work on December 3 and 5, 2008, if she had been notified that her employment was to terminate at the end of

November 2008. He also does not explain why she would have had access to the office after the end of November 2008. Sacks asserts that he did not know that Galiot was working on those two days, until he surprisingly discovered her in the office on the evening of December 5, 2008. He states that he did not come into the office every day, and thus did not know who was working at any given time. Yet, he testified that he only had two office employees besides Galiot, one of whom was a bookkeeper and presumably not in the office every day, and the other an office manager. Given the small size of his operation, it thus defies logic that he would not know who was running the small office while he was not present. In explanation, Sacks also asserts that due to a serious injury in November 2007, there were long periods of time when he was not present in the office at all or only on a limited basis, and he thus had no way of knowing whether Galiot was in the office on a particular day. However, by his own testimony, Sacks stated that he had returned to the office full-time in the summer of 2008. He therefore has not convincingly explained why he would have been unaware of the day to day operation of his business in November and December of 2008, several months after he had returned to full-time status.

After consideration of all of the evidence on this issue, I find that Respondent has not established by a preponderance of the evidence that Galiot was notified of termination in late October or early November of 2008. However, Respondent has established by a preponderance of the evidence that Galiot received notification of the termination by mid-March 2009.

B. Did Respondent notify USCIS of the termination of the employment relationship?

There is a dispute as to whether Respondent ever notified USCIS of the termination of its employment relationship with Galiot. Respondent claims that on December 1, 2008, Sacks wrote a letter to USCIS, notifying it that as of that date, Galiot was no longer employed by FSTC, that she had been offered transportation home which she declined, and that she had been provided with a copy of the letter.⁵ (JX 18). Sacks testified in detail as to the steps he took in preparing and mailing the letter. Sacks testified that he had no further contact with USCIS after mailing the letter on December 1, 2008, never received acknowledgement of receipt by USCIS and never followed up to insure that USCIS had received the letter. In contrast, the Administrator presented evidence that USCIS had no record of ever receiving notice of termination from Respondent.

As additional corroboration for its position, Respondent presented evidence that on July 13, 2009, several months before Galiot filed her claim with the Department of Labor, it sent the IDES a letter stating that it had notified USCIS (on an unspecified date, by unspecified method) that Galiot had been terminated from employment. Respondent argues that this July 2009 letter, written several months before the subject claim was filed, provides independent evidence that it, in fact, mailed a letter to USCIS on December 1, 2008. (R. Br. at 14). Respondent presented no further probative indicia establishing that it mailed the letter to USCIS such as a return receipt, etc.

Upon examination of the July 13, 2009, letter, it is apparent that this letter was sent by Respondent to IDES in response to a notification dated July 2, 2009, which Respondent received from IDES stating that Galiot had filed a claim for unemployment insurance benefits on June 28,

⁵ In testimony, Sacks admitted that he never gave Galiot a copy of the letter. (Tr. 257).

2009, and that unless FSTC submitted a protest, it would be found to be the “chargeable employer” for her claim. (RX 1). Although Respondent implies that in July 2009, it had no motive to pretend that it had notified USCIS of termination if it did not do so (given that the current claim was not filed until several months later), the notification from IDES, in fact, provides Respondent with a motive to establish that it was not the “chargeable employer.” Presumably if Respondent had given a termination notice to USCIS at some point prior to receiving the IDES notice, Respondent would not be held to be the “chargeable employer.” Furthermore, the July 13, 2009, letter by Respondent does not state that Respondent notified USCIS of termination *by letter on December 1, 2008*. It therefore is unclear whether the July 13, 2009, letter was referring to the December 1, 2008, letter or to some other method of notification to USCIS and is not persuasive proof of the existence of a December 1, 2008, letter. The July 13, 2009, letter also states, “[Galiot] chose to remain in the United States without legal authorization in attempt to find other employment,” facts that would be beyond the scope of Respondent’s knowledge given Sacks’ admitted last contact with Galiot in March of 2008. The letter thus indicates a degree of overstatement by Respondent, and causes me to question its overall truthfulness.

After examining all of the evidence presented, it is unclear to me whether a) Respondent mailed a letter to USCIS on December 1, 2008, which either got lost in the mail and was never delivered to USCIS or was, in fact, received by USCIS, but not recorded in its records; b) Respondent wrote a letter to USCIS dated December 1, 2008, but (perhaps unwittingly) failed to mail it; or c) Respondent did not prepare and mail a letter to USCIS on December 1, 2008, but fabricated such a letter after the fact to support its defense of Galiot’s claims. While I decline to find sufficient evidence to support the third option, i.e., that Respondent fabricated the letter, I do find that Respondent has not met its burden of establishing by a preponderance of the evidence that it notified USCIS of the termination of its employment relationship with Galiot. Although the regulations do not specify in detail the means by which an employer must notify USCIS of termination, given the importance of this notification to terminating its financial liability for salary and benefits, it does not make sense that Respondent would have handled this notification in the causal manner that Sacks testified to, i.e., by placing the letter in a post box rather than sending it by a means whereby it could be tracked or, at a minimum, failing to call USCIS to follow up on whether the letter had been received after several months had passed without either an acknowledgement of receipt or revocation of the H-1B petition.

C. Did Respondent offer Galiot transportation to her homeland?

There is a dispute as to whether Respondent offered Galiot transportation to her homeland. The only evidence on this issue is the conflicting testimony of Sacks and Galiot. Sacks claims that in a face to face conversation in late October or early November of 2008, he told Galiot she was being terminated and offered her transportation home, which she declined, stating that she wanted to remain in the United States and find other employment. Sacks testified that he never researched the cost of transportation to Serbia. Galiot claims that the October/November 2008 conversation never took place, but rather that in a mid-March 2009 telephone call with Sacks she requested transportation home to which he replied, “Good luck with that” and hung up on her.

Respondent argues that Galiot was not interested in returning to her homeland as evidenced by her subsequent marriage to a U.S. citizen and birth of a child. Respondent argues that the fact that Galiot never returned to her country makes it “clear that her version of the events is not credible.” (R. Br. at 17). In contrast, Galiot asserts that at the time she received notice of the termination of her employment in mid-March 2009, she was ready, willing, and able to return to her homeland and her future husband, whose work allows him to work from anywhere in the world, would have made arrangements to join her. The Administrator argues that Galiot is more credible than Sacks given his demonstrated pattern of not following through on his attestations, agreements, or representations.

Upon examination of all of the evidence on this issue, it is clear that one of the parties is not being truthful. The testimony of the two witnesses on this issue is in direct contrast to each other.

Overall, I find the testimony of Sacks to be less credible than that of Galiot for a couple reasons. First, as described in the section regarding whether Respondent gave Galiot notice of the termination of their employment relationship (addressed in section A, above), I found problems with Sacks’ explanation as to why he did not know that Galiot was working in the office on December 3 and 5, 2008. His explanation that he could not have known that Galiot was in the office in December 2008, because he had an accident in November 2007 and a lengthy recovery period, was not convincing given that he testified that he had returned to the office full-time in the summer of 2008 and given the small size of his operation.

Second, I do not find his testimony as to his reason for terminating Galiot to be credible.⁶ When I examine the timeline in this case, I do not believe Sacks’ explanation that he terminated Galiot for poor performance, because his actions do not support his statements that Galiot’s performance was increasingly unsatisfactory. An examination of the timeline shows: in November 2007, Sacks hired Galiot; by March of 2008, he was so satisfied with her performance that he gave her a pay raise on March 16, 2008; in April of 2008, he was still so satisfied with her performance that he went through the trouble of submitting an LCA to have her status changed to that of an H-1B nonimmigrant employee; he admitted that this was a new position that was created for Galiot to fill; on May 16, 2008, Sacks received notice that the petition had been approved; on May 25, 2008, Sacks decreased Galiot’s pay, claiming that her performance was now unsatisfactory; on October 1, 2008, he nevertheless brought her on in the new position provided for in the LCA; within a month however, according to Sacks’ testimony, he was so dissatisfied with Galiot’s performance that he terminated her employment in late October or early November. Missing from Sacks’ testimony is an explanation of why he would have continued to bring Galiot on in the new position on October 1, 2008, pursuant to the LCA, if her performance had been increasingly unsatisfactory and he had already determined by that point that Galiot was unable to meet his performance standards.

Given that the business of FSTC is one that has a definite high (April to October) and low season, with more tennis lessons and camps logically being provided in the high season, I find

⁶ I note however, that the reason he terminated Galiot is not relevant to whether he effected a *bona fide* termination of her employment and he could have lawfully terminated her for almost any reason.

Galiot's explanation that she was benched in December because of lack of work to be more credible than Sacks' explanation that she was terminated due to unsatisfactory performance.

However, even setting aside any credibility issues, given that the only evidence presented on the issue of the offer of transportation is conflicting testimony of two witnesses, I find that Respondent has failed to establish by a preponderance of the evidence that it offered Galiot transportation to her homeland. Aside from Sacks' testimony, Respondent offered no other probative indicia that it had taken any steps to provide Galiot with transportation to Serbia, and Sacks testified that he did nothing to research such transportation.

D. Conclusion as to whether Respondent effectuated a bona fide termination of its employment relationship with Galiot under the H-1B program to end its obligation to pay Galiot

Having considered all of the evidence presented and the arguments of the parties, I find that Respondent did not effectuate a *bona fide* termination of its employment relationship with Galiot under the H-1B program to end its obligation to pay Galiot. As described in detail above, although I find that Respondent established by a preponderance of the evidence that Galiot received actual notice of her termination in mid-March of 2009, I find that Respondent has not established by a preponderance of the evidence either that it notified USCIS of the termination of the employment relationship or that it offered Galiot transportation to her homeland.

III. What is the appropriate remedy for Respondent's violations of the Act?

A. Back pay for the productive period of work from October 1, 2008, through December 5, 2009.

Galiot is entitled to back pay for the productive time period from October 1, 2008, through December 5, 2009. During this period she was not paid at the required rate of \$19.35 per hour. She is therefore entitled to the difference between the salary she was paid and the salary she would have been paid if paid at the appropriate rate.

B. Back pay for the nonproductive period from December 6, 2009, through February 5, 2010.

Galiot is entitled to back pay for the nonproductive time period from December 6, 2009, through February 5, 2010. During this time period she should have been paid for full-time work at the rate of \$19.35 per hour, with the exception of a four-week maternity leave period and any applicable holiday periods.

C. Interest on back pay for both productive and nonproductive periods.

The Administrative Review Board has held that, notwithstanding that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. *Innawalli, supra*, slip op. at 8-9, *Yongmahapakorn, supra*, slip op. at 12-13. The Board also has set the rate

of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2).⁷ *Mao v. Nasser*, Case No. 06-121 (ARB Nov. 26, 2008) slip op. at 11-12. Based on the foregoing, I find that prejudgment compound interest is due on the back pay. I also find that post-judgment interest is due on all amounts I find to be due in back pay, until paid or otherwise satisfied.

ORDER

1. Respondent shall pay back salary in accordance with the foregoing findings for the period from October 1, 2008, through February 5, 2010.
2. Galiot is entitled to interest on the award of back pay at the applicable rate of interest which shall be calculated in accordance with 28 U.S.C. § 1961 and this Decision and Order.
3. The Administrator of the Wage and Hour Division, Employment Standards Division, Department of Labor, shall forthwith make such calculations as may be necessary to carry out this order, which calculations, however, shall not delay Respondent's obligation to make immediate payment to Galiot.
4. The Determination's allegations that Respondent failed to provide notice of filing of an LCA in violation of 20 C.F.R. § 655.734, § 655.805(a)(5), and failed to maintain required documentation as required by 20 C.F.R. § 655.731(b), § 655.738(e) are affirmed.

A

CHRISTINE L. KIRBY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of the Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. Copies of the Petition shall be served on all parties and on the administrative law judge.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty

⁷ For the ARB's discussion on why interest on back pay awards is appropriate, see *Doyle v. Hydro Nuclear Servs.*, Case Nos. 99-041, 99-042, 00-012 (ARB May 17, 2000) (ERA case).

(30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 655.840(a).